

This Opinion is Not a
Precedent of the TTAB

Mailed: December 15, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Clara Foods Co.
—

Serial No. 90746431
—

Thomas D. Foster of TDFoster Intellectual Property Law.

Alex Seong Keam, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

—
Before Greenbaum, Larkin and Cohen, Administrative Trademark Judges.

Opinion by Cohen, Administrative Trademark Judge:

Clara Foods Co. (“Applicant”) seeks registration on the Principal Register of the proposed standard-character mark ALL PROTEIN, NO ANIMAL for goods ultimately identified as “proteins for the food industry; enzymes for the food industry; enzyme preparations for the food industry; bioactives for the food industry, namely, yeast fermentation byproducts, namely, oligosaccharides in the nature of unprocessed polymers, fatty acids, carotenoids, lutein, zeaxanthin, and branch chain

amino acids, all being chemicals for use in the manufacture of foods” in International Class 1.¹

The Examining Attorney refused registration of Applicant’s proposed mark on the ground that it is merely descriptive of the goods identified in the application within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), and on the ground that it fails to function as a trademark under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052 and 1127.

When the descriptiveness and failure to function refusals were made final, Applicant appealed and requested reconsideration. The request for reconsideration was denied and the appeal resumed. The case is fully briefed.² In her appeal brief, the Examining Attorney withdrew the failure-to-function refusal and we give that refusal and the related briefing no further consideration.

We affirm the descriptiveness refusal to register.

¹ Application Serial No. 90746431 was filed on June 1, 2021 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the proposed mark in commerce.

² All TTABVUE and Trademark Status and Document Retrieval (“TSDR”) citations reference the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .PDF version of the documents. Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant’s appeal brief appears at 4 TTABVUE and its reply brief appears at 7 TTABVUE. The Examining Attorney’s brief appears at 6 TTABVUE.

I. Applicable Law

Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), prohibits registration on the Principal Register of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them,” unless the mark has acquired distinctiveness under Section 2(f) of the Act, 15 U.S.C. § 1052(f).³ A term is merely descriptive of goods or services if it conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *See, e.g., Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1373 (Fed. Cir. 2018) (quoting *N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017)); *Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1598 (TTAB 2018).

Whether a term is merely descriptive is not determined in the abstract, but rather in relation to the goods or services for which registration is sought, the context in which the term is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner in which the term is used or intended to be used. *Bayer A.G.*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); *Omnioime, Inc.*, 2020 USPQ2d 3222, at *10 (TTAB 2019) (citing *Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979)); *Canine Caviar Pet Foods*, 126 USPQ2d at 1598. The question is whether someone who knows what the goods or services are will understand the term

³ Applicant does not claim that its proposed mark has acquired distinctiveness.

to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012).

“We must ‘consider the commercial impression of a mark as a whole.’” *Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1515 (TTAB 2016)) (quoting *Real Foods*, 128 USPQ2d at 1374). “In considering [the] mark as a whole, [we] ‘may not dissect the mark into isolated elements,’ without consider[ing] . . . the entire mark,” *id.* (quoting *Real Foods*, 128 USPQ2d at 1374) (internal quotation omitted), “but we ‘may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components.’” *Id.* (quoting *Real Foods*, 128 USPQ2d at 1374) (internal quotation omitted). “Indeed, we are ‘required to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive.’” *Id.* (quoting *DuoProSS*, 103 USPQ2d at 1758).

Where a mark consists of multiple words, the mere combination of descriptive words does not necessarily create a non-descriptive word or phrase. *Omniome*, 2020 USPQ2d 3222, at *4; *Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1823 (TTAB 2012); *Assoc. Theatre Clubs Co.*, 9 USPQ2d 1660, 1662 (TTAB 1988). “If the words in the proposed mark are individually descriptive of the identified goods, we must determine whether their combination ‘conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.’” *Fallon*, 2020 USPQ2d 11249, at *7 (TTAB 2020) (quoting *Fat Boys*, 118 USPQ2d at 1515-16) (internal quotation omitted)). However, if each component retains its merely descriptive significance in

relation to the goods or services, the combination results in a composite that is itself merely descriptive. *Id.* (quoting *Fat Boys*, 118 USPQ2d at 1516); see *Oppedahl*, 71 USPQ2d at 1374 (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents and for tracking the status of the records by means of the Internet); *Phoseon Tech.*, 103 USPQ2d at 1823 (“When two or more merely descriptive terms are combined, ... [i]f each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive.”).

A mark is suggestive, and not merely descriptive, if it requires imagination, thought, and perception on the part of someone who knows what the goods or services are to reach a conclusion about their nature from the mark. See, e.g., *Fat Boys*, 118 USPQ2d at 1515; *Tennis in the Round, Inc.*, 199 USPQ 496, 497 (TTAB 1978) (“If one must exercise mature thought or follow a multi-stage reasoning process in order to determine what characteristics the term identifies, the term is suggestive rather than merely descriptive.”).

II. Evidence of Descriptiveness and Analysis

“Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers[,] and other publications.” *Zuma Array Ltd.*, 2022 USPQ2d 736, at *8 (TTAB 2022) (quoting *Fallon*, 2020 USPQ2d 11249, at *7 (quoting *Real Foods*, 128 USPQ2d at 1374)). “These sources may include [w]ebsites, publications and use in labels, packages, or in advertising materials directed to the

goods.” *Id.* (quoting *Fallon*, 2020 USPQ2d 11249, at *7-8 (quoting *N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017) (internal quotation omitted)).

In support of her descriptiveness refusal, the Examining Attorney argues, relying on various dictionary definitions,⁴ that “all” refers to “totality”;⁵ “protein” refers to “substances needed for sustenance”; “no” refers to “not any”;⁶ and “animal” refers to “living creatures excluding humans or things derived from animals”;⁷ and that ALL PROTEIN, NO ANIMAL is merely descriptive because it describes the “goods as being all protein with no animal products.”⁸ The Examining Attorney continues, asserting that Applicant’s “enzymes and bioactives such as carotenoids, lutein, zeaxanthin, and amino acids’ are also proteins”; explaining that “[p]rotein is [a] substance made up of 20 amino acids”;⁹ that there are nine essential amino acids with three of them referred to as the “branched-chain amino acids”;¹⁰ and thus, “both the individual components and the composite result are descriptive of [A]pplicant’s goods and do not create a unique, incongruous, or nondescriptive meaning in relation to the

⁴ MNEMONICDICTIONARY.COM, July 7, 2022 Office Action at TSDR 145; THE AMERICAN HERITAGE DICTIONARY online, *id.* at 156; COLLINS DICTIONARY online, *id.* at 158; ALLWORDS.COM online, *id.* at 163-64; WEBSTER’S 1931 DICTIONARY online, *id.* at 167-68; THE AMERICAN HERITAGE DICTIONARY online, *id.* at 170; CAMBRIDGE DICTIONARY online, *id.* at 172-85.

⁵ *Id.* at 1.

⁶ *Id.*

⁷ *Id.*

⁸ September 17, 2021 Office Action at TSDR 1.

⁹ 8 TTABVUE 4.

¹⁰ *Id.* at 4-5.

goods. Specifically, the mark describes the goods as being protein with no animal ingredients.”¹¹

Additionally, the Examining Attorney argues that Applicant’s goods “are promoted as being proteins which contain no animal products.”¹² She points to an Internet article from FOODNAVIGATOR-USA.COM about Applicant entitled “Clara Foods rebrands as The EVERY Company, launches ‘nearly invisible’ animal-free egg protein (without chickens)”¹³ which reads, in part:

From a nutritional perspective, he said: “EVERY ClearEgg is a highly digestible animal-free protein source.

...

The launch comes hot on the heels of The EVERY Co’s first product: ‘animal-free’ pepsin, an enzyme traditionally sourced from pig stomachs that’s used in everything from digestive health supplements to the preparation of plant-based protein hydrolysates.¹⁴

An Internet article from FoodBusinessNews.net reads that:

The Every Co., formerly known as Clara Foods, is launching an animal-free egg protein.

...

The Every Co. has partnered with BioBrew, ... to produce its animal-free protein at scale.

...

¹¹ *Id.* at 4.

¹² *Id.* at 6.

¹³ July 7, 2022 Office Action at TSDR 2.

¹⁴ *Id.* at 3-4.

Proteins created by The Every Co. will support label claims, including kosher, halal and animal-free. The company plans to expand its range of animal-free proteins for use in foodservice and consumer packaged goods applications.¹⁵

The Examining Attorney also references excerpted articles “showing the popularity of animal-free products,”¹⁶ including:

- NEWYORK-PRESBYTERIAN Internet article entitled “12 alternate protein sources for vegetarians”;¹⁷
- C&EN Internet article entitled “Animal-free proteins on a winning streak”;¹⁸
- A FACEBOOK post from Kure which reads “Yes protein. No animal products!”;¹⁹
- FORKS OVER KNIVES Internet article entitled “7 Ways Animal Protein is Damaging Your Health”;²⁰
- FOOD UNFOLDED Internet article entitled “The Surprising Sources of Protein that are not Animal”;²¹
- EPICUREAN VEGAN Internet article discussing non-animal protein sources;²²
- SPECPAGE Internet article discussing why non-animal protein is on the rise and challenges in designing products with non-animal derived proteins;²³ and

¹⁵ *Id.* at 48.

¹⁶ 8 TTABVUE 5.

¹⁷ September 17, 2021 Office Action at TSDR 2.

¹⁸ July 7, 2022 Office Action at TSDR 54.

¹⁹ *Id.* at 186.

²⁰ *Id.* at 187-98.

²¹ *Id.* at 199-204.

²² *Id.* at 205-07.

²³ *Id.* at 212-21.

- SWOLVERINE Internet article entitled “Plant vs. Animal Protein: Is Plant Protein Better than Animal Protein?”²⁴

In arguing that its proposed mark is not descriptive, Applicant contends that “[w]hile the individual terms suggest the characteristics of applicant’s goods, one must be struck by the vagueness and incompleteness of the combined terms ... Yes, the involved mark suggests goods being all protein with no animal products or ingredients. But given the syntax of the combination of these two short abrupt sentences, the terms do not directly tell consumers a characteristic or function of the goods.”²⁵

We are not persuaded by Applicant’s argument that the syntax of two short sentences renders its proposed mark non-descriptive. In combination, the words “all,” “protein,” “no” and “animal” immediately describe Applicant’s goods – protein which does not contain animal products. There is nothing in the record to support a finding that the combination of “all,” “protein,” “no” and “animal” in Applicant’s proposed mark is anything more than the sum of its descriptive parts when used in connection with Applicant’s goods. Viewed in its entirety, ALL PROTEIN, NO ANIMAL does not present an incongruity or lose its descriptive meaning; rather, it readily and immediately informs the consumer that the goods offered are protein with no animal products. *See Copytele Inc.*, 31 USPQ2d 1540, 1542 (TTAB 1994) (combination of individually descriptive words SCREEN FAX PHONE not incongruous); *cf. Shutts*, 217 USPQ 363, 365 (TTAB 1983) (“incongruity is one of the accepted guideposts in

²⁴ *Id.* at 222-31.

²⁵ 6 TTABVUE 6.

the evolved set of legal principles for discriminating the suggestive from the descriptive mark”). No mature thought or multi-stage reasoning is necessary to determine the nature or features of the goods offered. Indeed, the combination serves to enhance the descriptive meaning of each of these words as applied to Applicant’s goods because, combined, the words more fully describe Applicant’s goods than do the words alone.

Applicant also argues that the Examining Attorney’s evidence does not show any use of the specific phrase ALL PROTEIN, NO ANIMAL. “While these articles may indicate that plant and fungal based proteins may be more beneficial than the protein derived from animal sources, none of them used the nebulous terms ALL PROTEIN or NO ANIMAL to describe [A]pplicant’s goods.”²⁶ Applicant further contends that “a Google search of the the [sic] terms ALL PROTEIN, NO ANIMAL located no other party using these terms to describe any sort of competitive product”;²⁷ and that if competitors used the proposed mark in a descriptive fashion, “they would have been found in this Google search or identified by the Examining Attorney.”²⁸

These arguments are unavailing. Applicant may be the first and only user of ALL PROTEIN, NO ANIMAL for the identified goods but that does not obviate a mere descriptiveness refusal. “Being ‘the first and only one to adopt and use the mark sought to be registered does not prove that the mark is not descriptive.’” *Swatch Grp.*

²⁶ June 2, 2022 Petition to Revive at TSDR 4.

²⁷ January 9, 2023 Request for Reconsideration at TSDR 3.

²⁸ 6 TTABVUE 8.

Mgmt. Servs. AG, 110 USPQ2d 1751, 1761 n.50 (TTAB 2014) (quoting *Bailey Meter Co.*, 102 F.2d 843, 41 USPQ 275, 276 (CCPA 1939)); see *Fat Boys*, 118 USPQ2d at 1515 (“first and only user of a term does not render that term distinctive”); *Phoseon Tech.*, 103 USPQ2d at 1826; *Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009) (competitor need is not the test for descriptiveness).

III. Conclusion

In the context of the identified goods, we find that the combination of “all,” “protein,” “no” and “animal” does not present a unique or incongruous phrase. ALL PROTEIN, NO ANIMAL is merely descriptive of Applicant’s goods without need for conjecture or speculation.

Decision: The refusal to register is affirmed.